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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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LAWRENCE CANTOR, PETITIONER

*v.*

THE DETROIT EDISON COMPANY

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the antitrust laws. Applications of those laws often relate to anticompetitive practices of firms subject to various forms of state regulation. The claim frequently is made that those practices have been approved by the state and therefore are exempt from the antitrust laws under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341.

The conduct that is the subject of the present antitrust challenge is a public utility's practice, set out in a provision of a general tariff which the state regulatory commission has approved, in circumstances where there is no state regulatory scheme or policy which affirmatively requires or favors the practice. The United States has a significant interest in the question whether such state approval is sufficient to exempt the practice from the antitrust laws.

## STATEMENT

Petitioner Cantor is a proprietor of a drugstore in Detroit, Michigan (App. 4a). In 1973, he filed in the United States District Court for the Eastern District of Michigan, a civil antitrust suit against respondent Detroit Edison Company seeking treble damages and injunctive relief (App. 2a-8a). Since 1886, more than 20 years prior to Michigan's first regulation of the sale of electricity, Detroit Edison and its predecessor have followed the practice of charging its customers a single rate under which it supplies both electricity and light bulbs (App. 26a). The complaint alleges that this practice constituted an attempt to monopolize and a monopolization of the sale of light bulbs in the territory Detroit Edison serves, in violation of Section 2 of the Sherman Act (App. 5a-6a), and an illegal tying arrangement, in violation of Section 3 of the Clayton Act (App. 7a).

Detroit Edison moved for summary judgment, on the ground that its "lamp exchange" program had been approved by the Michigan Public Service Commission as a part of the general tariffs filed with that agency (App. 24a, 26a). The district court granted the motion, ruling that "[w]hen a state agency acts affirmatively in approving rates and practices of a utility, there is no antitrust liability" (App. 58a). The court stated (App. 59a):



> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.

The court also noted that the Public Service Commission has "continuing jurisdiction" to supervise the rates, service and operation of electrical utilities and concluded that "the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine" (*ibid.*).

The United States Court of Appeals for the Sixth Circuit affirmed *per curiam* (App. 62a). It stated that "the district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing su-

pervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown* * * *" (*ibid.*).

## SUMMARY OF ARGUMENT

*Parker* v. *Brown*, 317 U.S. 341, was the origin of the rule that the antitrust laws do not apply to "private" anticompetitive conduct that a state has compelled. The Court there distinguished between anticompetitive conduct that the state required as part of a deliberate state regulatory policy and program, which is exempt from the antitrust laws as "state action," and conduct that the state has merely authorized, which is not exempt. Unless the anticompetitive conduct is "required" or "compelled" by the state, it is subject to the Sherman Act; the "state action" exemption is not available if the "anticompetitive conduct is 'prompted' by state action." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790, 791. See, also, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 354-357.

Under these principles, Detroit Edison's lamp exchange program is not exempt from the antitrust laws. The utility's policy of selling electricity and bulbs in a single package is a voluntary practice; neither the state nor the Michigan Public Service Commission has any special policy favoring the practice. Although the Commission conducted an investigation of the utility's general tariff, which included the provision for the bulb exchange program, there is no indication that this investigation specifically



considered the practice or its effect upon competition in the sale of light bulbs. The fact that the Commission's approval of the tariff apparently took the procedural form of an "order" did not convert all the provisions of the general tariffs into state-mandated action for antitrust purposes.

## ARGUMENT

The complaint in this case alleged that Detroit Edison's practice of tying the sale of electricity to the sale of light bulbs constituted an illegal attempt to monopolize and monopolization of the sale of light bulbs in the areas which Detroit Edison serves (where it has a monopoly of the business of supplying electricity), in violation of Section 2 of the Sherman Act, and an illegal tying arrangement, in violation of Section 3 of the Clayton Act. These allegations state a cause of action for violation of the antitrust laws, and the complaint ordinarily would not be subject to dismissal without a trial. Cf. *Times-Picayune* v. *United States*, 345 U.S. 594; *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1; *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571, 576; *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464. The question here is whether the practice is immune from antitrust liability because it is reflected in a general tariff which the Michigan Public Service Commission has approved. The United States submits that under the decisions of this Court dealing with the "state action" exemption from the antitrust

laws, the approval by the Michigan Commission of Detroit Edison's general tariff which contains a provision covering the lamp exchange program does not immunize the practice from the antitrust laws.

## I.

### PRIVATE ANTICOMPETITIVE CONDUCT THAT THE STATE HAS APPROVED, BUT HAS NOT REQUIRED AS PART OF A REGULATORY PROGRAM, IS NOT EXEMPT FROM THE ANTITRUST LAWS UNDER THE STATE ACTION DOCTRINE OF *PARKER* v. *BROWN*, 317 U.S. 341.

The principle that the antitrust laws do not apply to "private" anticompetitive conduct compelled by the state had its origin in *Parker* v. *Brown, supra.* That case involved a private antitrust suit challenging the California raisin marketing program, which the state had adopted to restrict competition and maintain prices (317 U.S. at 346). Under the program, producers could petition for a marketing plan and, following approval by a state agency and consent by a majority of the producers in the area, the plan became effective. The raisin marketing plan imposed various limitations upon the production and marketing of raisins, and there were criminal penalties for violations. The program was challenged as violating the Sherman Act in a suit for an injunction brought by a producer and packer of raisins in California, who alleged that it would unreasonably restrain his trade in raisins.



The Court held that the marketing program did not violate the Sherman Act. Although it ruled that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it" (317 U.S. at 351), it held that the program was state and not private action. "Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. * * * The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application" (317 U.S. at 352).

The Court stated that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" (317 U.S. at 350-351). It concluded (317 U.S. at 352):

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Subsequent decisions of this Court have reiterated the distinction drawn in *Parker* that the "state ac-

tion" exemption applies only where the state compels the anticompetitive conduct and not where it merely authorizes or approves such conduct. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, the Court rejected a private party's claim that its status as exclusive purchasing agent for the Canadian government brought it within the *Parker* exemption, because there was no indication that any Canadian government official had "directed" the defendant to engage in the anticompetitive conduct (*id.* at 706) or that Canadian law "compelled" such conduct (*id.* at 707). More recently, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, the Court stated (p. 791): "It is not enough that * * * anticompetitive conduct is 'prompted' by state action." Instead, it reiterated that private conduct takes on the character of "state action," with its concomitant antitrust exemption, only when "the activity is required by the State acting as sovereign" or "compelled by direction of the state acting as a sovereign" (421 U.S. at 790, 791).

The Court faced a similar issue, and reached a similar conclusion, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The question in that case was whether a public utility's termination of electric service, pursuant to a general tariff filed with and approved by the state public utility commission, was state action under the Civil Rights Act (42 U.S.C. 1983). In holding that the utility's private action in terminating service was not transmuted into state



action merely "because the State 'has specifically authorized and approved' the termination practice" (p. 354), the Court stated (p. 357; footnote omitted):

> Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

The basic rationale of *Parker* v. *Brown* and the cases following it requires, we submit, that for private anticompetitive conduct to be state action and therefore immune from the antitrust laws, it must be conduct that the state affirmatively has required as part of a deliberate state regulatory policy or program. The California marketing program which was held to constitute state action in *Parker* represented a deliberate state decision to substitute state regulation for the normal free play of competition which the Sherman Act is designed to protect. The Court in *Parker* repeatedly pointed out that the action there challenged was required by the state as a matter of "command" and "governmental policy" (317 U.S. at 350, 352).[1]

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[1] Consistent with this analysis, a number of federal courts have held that private anticompetitive conduct that the state has approved or acquiesced in, but has not directed as part of a deliberate state policy, is not state action that is immune from the antitrust laws. See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (C.A. 1), certiorari denied, 400 U.S. 850; *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224, 1226-1227 (C.D. Cal.),

As we now show, Detroit Edison's lamp exchange program is not compelled by the state as a matter of governmental policy and therefore is not exempt from the antitrust laws.

## II.

### THE MICHIGAN PUBLIC SERVICE COMMISSION'S APPROVAL OF DETROIT EDISON'S GENERAL TARIFF WHICH CONTAINS A PROVISION COVERING ITS BULB EXCHANGE PROGRAM DOES NOT MAKE THE PROGRAM STATE ACTION WHICH IS IMMUNE FROM THE ANTITRUST LAWS.

Unlike the raisin marketing program in *Parker* v. *Brown*, which reflected "the legislative command of the state" (317 U.S. at 350), Detroit Edison's policy of selling electricity and bulbs in a single package is a wholly voluntary practice as to which the state has no special policy. There is no Michigan statute which either requires or favors the practice. The Michigan legislature has never displayed any interest in the manner in which light bulbs are sold in the state. Similarly, the Michigan Public Service Commission apparently has no policy that either favors or opposes—let alone compels—the program.

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certiorari dismissed, 414 U.S. 801; *Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 298 F. Supp. 1109, 1112 (W.D. Pa.); *Marnell* v. *United Parcel Service*, 260 F. Supp. 391 (N.D. Cal.). The Fourth Circuit, however, has taken the contrary view. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248; *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Co. of Virginia*, 480 F.2d 754; *Goldfarb* v. *Virginia State Bar*, 497 F.2d 1, reversed and remanded, 421 U.S. 773.



Indeed, that agency apparently has approved tariffs of other utilities that do not have a lamp exchange program (App. 51a).

The sole basis upon which the district court ruled that Detroit Edison's lamp exchange program constitutes state action was that, after conducting its own investigation and hearings, "the Commission ordered specific tariffs" (App. 59a).[2] There is nothing to indicate, however, that this tariff investigation focused upon the utility's practice of combining the sale of electricity and light bulbs (App. 50a-52a, 126a, 132a, 156a-160a, 164a), or the effect of the combined sale policy upon competition in the sale of light bulbs (App. 157a). The situation thus apparently parallels that in *Jackson*, where the state regulatory commission carefully scrutinized the rate portions of the tariff but did not specifically consider the provision that was challenged under the Civil Rights Act (419 U.S. at 354-355).

The Michigan Commission's indirect authorization of the practice, resulting from its approval of the general tariff, was not state action in the *Parker* sense of constituting a command of the state, made in the execution of a state policy, which Detroit Edison was required to obey. To the contrary, respondent merely "exercise[d] * * * the choice allowed by state law [of including the lamp exchange pro-

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[2] Although the Commission's order is not a part of the record, it may have amounted to no more than an order that "approved" the general tariff (see App. 334a, 339a).

vision in the tariff] where the initiative comes from it and not from the State" (*Jackson*, *supra*, 419 U.S. at 357). That is not enough to make it state action under the *Parker* doctrine.

The fact that the Michigan Commission's approval of the tariff apparently took the procedural form of an "order" does not convert all the provisions of the general tariff into mandated state action for antitrust purposes. The critical inquiry in determining whether private anticompetitive conduct can be justified as state action is the nature of the state's involvement in approving the practice and not the form such approval takes.

Where, as in *Parker*, the state's involvement reflected a deliberate mandatory state policy and implementation of the program by state officials, it was state action without regard to whether the state merely approved the program or affirmatively ordered it into effect. Here, on the other hand, the fact that the state commission's approval of the tariff is cast in the form of an "order" does not transmute Detroit Edison's private practice into state action, since the program is not conducted pursuant to any affirmative state program or policy that requires it.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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